Supreme Court of the United States

October Term, 1950

No._____

THE VALIER COMPANY, a Montana Corporation,
Petitioner,

vs.

THE STATE OF MONTANA, CAREY LAND ACT BOARD, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General; and PONDERA COUNTY CANAL AND RESERVOIR COMPANY, a Montana Corporation,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.
OPINIONS OF THE COURT BELOW

No opinion of the trial court was rendered or reported. The decree of the trial court, the District Court of the Ninth Judicial District of the State of Montana, in and for the County of Pondera, appears at pages 95 to 103 of the record.

The opinion of the Supreme Court of the State of Montana has not yet been officially reported. The decision and opinion of the Supreme Court of the State of Montana which peti-

tioner seeks to have reviewed appears at pages 109 to 140 of the record. It is also found at 215 P. (2d) 966, and in Vol. 3 Montana State Reporter 27 (mimeographed).

II.
JURISDICTION

Petitioner adopts the "Statement of Grounds of Jurisdiction" in the Petition for Writ of Certiorari for showing the grounds upon which the jurisdiction of this Court is invoked.

III.
STATEMENT OF THE CASE

Petitioner adopts the Summary Statement of the Matter Involved in the Petition for Writ of Certiorari as a statement of the case for the purpose of this brief.

IV.
SPECIFICATIONS OF ERROR

The Supreme Court of the State of Montana erred:

1. In construing and holding the Federal Carey Act, as amended (Section 4 of the Act of August 18, 1894, as amended by the Act of June 11, 1896, now Sections 641 and 642, Title 43, U. S. C. A.) to require petitioner to sell its Carey-Act lands and appurtenant water stock to a limited class of purchasers, at fixed prices, in tracts of 160 acres or less to any one buyer.

2. In construing and holding said Federal Carey Act, as amended, to prohibit petitioner from counting sales of water stock appurtenant to Carey-Act lands, acquired by petitioner through foreclosure and deeds in lieu of foreclosure toward the achievement of the sale of 90% of all

authorized water stock under petitioner's contracts with the State of Montana.

3. In denying petitioner's rights and title in real property claimed and set up under the authority of the United States through patents from the United States.

4. In construing and administering Section 1983, Revised Codes of Montana, 1935 (Section 81-2118, Revised Codes of Montana, 1947) and Section 1976, Revised Codes of Montana, 1935 (Section 81-2111, Revised Codes of Montana, 1947) in a manner repugnant to said Federal Carey Act.

5. In construing and administering Section 1983, Revised Codes of Montana, 1935 (Section 81-2118, Revised Codes of Montana, 1947) in such an arbitrary, discriminatory, capricious and oppressive manner as to deprive petitioner of its property without due process of law and to deny petitioner the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

6. In encroaching upon the legislative function of the Congress of the United States and the Legislature of the State of Montana so as to impair the obligations of petitioner's contracts with the State of Montana in violation of Section 10, Article I of the Constitution of the United States.

V.

ARGUMENT

SUMMARY OF THE ARGUMENT

1. The Supreme Court of Montana misconstrued the Federal Carey Act, Sections 641 and 642 of Title 43, U. S.

C. A., by going beyond the intended scope and meaning of the Act and interpreting it in a manner never heretofore contemplated.

2. The Supreme Court of Montana denied petitioner's rights to a fee simple title to lands set up and claimed under a federal authority evidenced by federal patents.

3. The Supreme Court of Montana construed state statutes in a manner repugnant to a Federal Act.

4. The decision of the Supreme Court of Montana administers state statutes in an arbitrary, discriminatory, capricious, and oppressive manner in violation of the due process and equal protection clauses of the Constitution of the United States, and encroaches upon the legislative function to an extent impairing the obligations of contract in violation of Section 10, Article I of the Constitution of the United States.

FEDERAL QUESTION DECIDED BY MONTANA SUPREME COURT NOT PREVIOUSLY DETERMINED BY THIS COURT

The facts, as more fully stated in the Petition, are that petitioner is a construction company under a typical federal Carey Land Act project; that petitioner, through its predecessors, acquired a fee simple title to approximately 20,000 acres of irrigated land by foreclosure (or deeds in lieu of foreclosure) of liens against Carey-Act lands; and that the Supreme Court of Montana has imposed restrictions upon petitioner which abrogate petitioner's fee simple title.

As stated in the Petition, the Supreme Court of the State of Montana based its decision upon its construction of the Federal Carey Act as amended (Section 4 of the Act of August 18, 1894, as amended by the Act of June 11, 1896, now Sections 641 and 642, Title 43, U. S. C. A. See Appendix "A" to Petition).

The Montana Supreme Court apparently sought to foreclose the jurisdiction of this Court by referring to the Carey Act as an enabling act only. This, however, does not preclude the jurisdiction of this Court.

> *Montana ex rel. Haire v. Rice,* 204 U. S. 291, 299, 51 L. Ed. 490, 494-495, 27 S. Ct. 281 (Jan., 1907).

It is submitted that the Federal Act should be limited in its scope, but it must be recognized that the Montana Supreme Court did not so limit the scope of the Federal Act. Rather, the Montana Supreme Court based its decision upon a strained construction of the Federal Act. It seized upon certain magic words, "until disposed of to actual settlers" in the Federal Act and rested its decision thereon. (R. 115, 116.)

In setting out and emphasizing specific language of the Federal Act (R. 115), in discussing the Congressional intent (R. 115, 116), and in referring to textbooks on the Federal Act (R. 115, 116), the Montana Supreme Court clearly showed that its decision was based upon its interpretation of the Federal Act, as amended. Where the final decision of the highest court of a state rests on its interpretation of a Federal statute, such decision is reviewable on writ of certiorari to the United States Supreme Court.

Longest v. Langford, 274 U. S. 499, 71 L. Ed. 1170, 47 S. Ct. 668 (May, 1927).

Straus v. American Publishers' Association, 231 U. S. 222, 58 L. Ed. 192, 34 S. Ct. 84 (Dec., 1913).

Whether or not the decision was based upon a federal question should be determined by the Supreme Court of the United States.

First National Bank v. Anderson, 269 U. S. 341, 70 L. Ed. 295, 46 S. Ct. 135 (Jan., 1926).

Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 667, 82 L. Ed. 685, 1123, 58 S. Ct. 443, 755 (Jan., Feb., 1938).

State Tax Commission v. Van Cott, 306 U. S. 511, 83 L. Ed. 950, 59 S. Ct. 605 (Mar., 1939).

Substantially the same facts and statutes were involved in the case of *North Side Canal Co., Ltd., v. Idaho Farms Co.,* 60 Idaho 748, 96 Pac. (2d) 232, and the Idaho Supreme Court reached conclusions diametrically opposed to those of the Supreme Court of Montana.

The Circuit Court of Appeals of the Ninth Circuit considered the Idaho Supreme Court's decision as being based upon local grounds, and a reading of the opinion of the Idaho Supreme Court reveals that the Idaho court did find the basis for its decision in the state statutes, rather than in the Federal Carey Act. In this respect, the decision of the Idaho court is clearly distinguishable from that of the Montana Supreme Court in the instant case. As has been shown, the Montana Supreme Court has not restricted the meaning of the Federal Act, but has broadly interpreted it as supplying the basis for its conclusions, particularly in the

emphasis which it has placed upon the words "until disposed of to actual settlers" found in the amendment to the Federal Act. (R. 115, 116).

The question involved has not been previously presented to this Court. This Court did, however, uphold the priority and validity of a construction company's Carey-Act lien in *Portneuf-Marsh Valley Canal Company v. Brown,* 274 U. S. 630, 639, 71 L. Ed. 1243, 1270, 47 S. Ct. 692 (May, 1927), where it was said of the statutory provision for such a lien by Mr. Justice Stone:

> "Its primary object was to secure the requisite capital for the creation of costly irrigation systems by which arid public lands could be brought under cultivation. It could not have been contemplated that the 'first and prior' liens authorized by the statute to secure the repayment of such capital should be subsequent to every other lien which might be placed upon the property except those formally executed by the landowners or that a 'first lien' of that character would attract capital into a new and hazardous enterprise. * * *"

The foregoing decision of this Court recognized the principle that a Carey-Act lien to secure the construction costs of building an irrigation system is a lien in the true sense of the word. The Supreme Court of Montana has ignored the principle enunciated by this Court, and has applied the Federal Carey Act in a manner which emasculates the construction company's lien.

The holding that petitioner does not have the ordinary incidents of title after foreclosure of its lien (or after acceptance of a deed in lieu of foreclosure) means that the so-called

lien was never a lien at all. The Supreme Court of Montana has thus misconstrued the Federal Carey Act and has thereby decided a substantial federal question contrary to an applicable decision of this Court.

The foregoing argument that the Montana Supreme Court erred in its interpretation of the lien provision of the Federal Carey Act, as applied to the nature of petitioner's title, is equally applicable to petitioner's contention that the Montana Court erred in finding that petitioner was not entitled to count sales of water stock (made appurtenant to lands acquired through foreclosure or deeds in lieu of foreclosure) toward the accomplishment of the sale of 90% of the authorized water stock under petitioner's contracts with the State of Montana. The lien is applied against the water stock as well as against the land to which the water stock was made appurtenant. If it was, as petitioner contends, a lien in the true and ordinary sense, it was in the nature of a purchase money lien against the water stock. It follows, then, that the transactions by which the water stock was sold were final sales, and petitioner is entitled to have them construed as final sales in the construction of its contracts with the State of Montana.

RIGHT OR TITLE SET UP OR CLAIMED UNDER AUTHORITY OF FEDERAL PATENT

The patent of the Carey Act lands from the United States to the State of Montana gave the State of Montana the "power to convey the same, ***in fee simple*** in accordance with the provisions of the said Acts." (Emphasis supplied.) (R. 106.) The Act of Congress of June 11, 1896 (now Section

642, Title 43, U. S. C. A.) is one of the Acts referred to in the patent and this amendment provides for the lien and states that it "when created shall be valid on and against the separate legal subdivisions of land reclaimed." (See appendix "A" to Petition.) Where a right or title is claimed under a statute of the United States the judgment of the highest court in a state may be reviewed by the United States Supreme Court on a writ of certiorari.

> *Montana ex rel. Haire v. Rice,* 204 U. S. 291, 51 L. Ed. 490, 27 S. Ct. 281 (Jan., 1907).
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> *Henry Ford & Son, Inc., v. Little Falls Fibre Co.,* 280 U. S. 369, 74 L. Ed. 483, 50 S. Ct. 140 (Jan., 1930).
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> *Lytle v. State of Arkansas,* 63 U. S. 193, 22 How. 193, 16 L. Ed. 306 (Feb., 1860).

By incorporating the Congressional Acts in the patents by reference, the federal authority, as executed under the Department of Interior, contemplated a lien in the ordinary sense of the word. The federal authority further contemplated conveyances in fee simple according to the established meaning of the term. Courts are bound to construe words according to their accepted meaning.

> *Western Union Teleg. Co. v. Lenroot,* 323 U. S. 490, 506, 89 L. Ed. 414, 425, 65 S. Ct. 335 (Jan., 1945).

The monstrous restrictions which the Supreme Court of Montana imposed upon petitioner's power of alienation are absolutely repugnant to any concept of a fee simple. Such restraints, unsupported by statute or contract, have been unknown to the law since feudal times. By its dogmatic assertion that covenants run with the land and result in

certain restrictions upon petitioner, the Supreme Court of Montana has denied petitioner its fee simple title asserted under the authority of the federal patent.

French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 54, 46 L. Ed. 800, 22 S. Ct. 563 (April, 1902).

DePeyster v. Mitchell, 6 N. Y. 467 (1852).

STATE STATUTE CONSTRUED IN A MANNER REPUGNANT TO FEDERAL STATUTE

Although the primary basis for the decision of the Supreme Court of Montana is the amendment to the Federal Carey Act, as heretofore pointed out, the Court has attempted to bolster its decision by reference to the Montana statute, Section 1983, Revised Codes of Montana, 1935, Section 81-2118, Revised Codes of Montana, 1947. (See Appendix "B" to Petition.) To whatever extent the decision is grounded upon the state statute, the decision is repugnant to the Federal Carey Act, Sections 641 and 642, Title 43, U. S. C. A.

Where the judgment of a state court based upon its interpretation of a state statute frustrates the intent of a Federal statute, the United States Supreme Court will declare such judgment to be invalid.

Wissner v. Wissner, 338 U. S. 655 (Feb., 1950).

The argument in the preceding paragraphs that the amendment to the Federal Carey Act contemplated a lien in the accepted meaning of the term is applicable here, and any conclusions of the Montana Supreme Court that a lien provided by Montana statutes was not in fact a lien renders the Montana statutes repugnant to the Federal Act.

The intentions of Congress with respect to the lien and its purposes clearly appear in 28 Congressional Record, p. 6222 et seq. See also 3 Kinney on Irrigation and Water rights, Chapter 67, Sec. 1316, p. 2390. The Supreme Court of the State of Montana, however, *expressly disregarded* the Congressional intent, as is shown by its own opinion. (R. 116.)

STATE STATUTE CONSTRUED TO DEPRIVE PETITIONER OF PROPERTY IN VIOLATION OF DUE PROCESS AND EQUAL PROTECTION CLAUSES OF XIVTH AMENDMENT

To whatever extent the decision of the Montana Supreme Court is grounded on the state statute, it administers a state statute in an arbirary, discriminatory, capricious and oppressive manner in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

The decision strips petitioner's title to its lands of all the vital attributes of a fee simple title. (R. 130-131, 134.)

The Supreme Court of the State of Montana has administered the state statute in an arbitrary, discriminatory, capricious and oppressive manner in the following respects:

1. In basing its decision on false assumptions of fact and on matters of fact not contained in the record (which were not proper matters for judicial notice), thereby depriving petitioner of its constitutional right to notice and its constitutional right to be heard. (R. 141 to 150.)

Saunders v. Shaw, 244 U. S. 317, 319, 61 L. Ed. 1163, 1165, 37 S. Ct. 638 (June, 1917).

Standard Oil Co. v. Missouri, 224 U. S. 270, 281, 56 L. Ed. 760, 767-768, 32 S. Ct. 406 (April, 1912).

Windsor v. McVeigh, 93 U. S. 274, 282, 23 L. Ed. 914, 917 (Dec., 1876).

2. In ignoring the principles of appellate practice by injecting issues which were not raised by any of the parties litigant, thereby depriving petitioner of its constitutional right to notice and its constitutional right to be heard. (R. 141-142, 212-213.)

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U. S. 673, 677, 74 L. Ed. 1107, 1111, 50 S. Ct. 451 (June, 1930).

Reynolds v. Stockton, 140 U. S. 254, 265, 35 L. Ed. 464, 468, 11 S. Ct. 773 (May, 1891).

Coe v. Armour Fertilizer Works, 237 U. S. 413, 426, 59 L. Ed. 1027, 1032, 35 S. Ct. 625 (May, 1915).

3. In concluding that covenants run with the land when no express covenant nor reasonable implication of a covenant is to be found in any contract or statute. (R. 159 to 190.)

Orchard Homes Ditch Co. v. Snavely, 117 Mont. 484, 159 Pac. (2d) 521 (June, 1945).

Sec. 7417, Revised Codes of Montana, 1935 (Sec. 58-305, R. C. M., 1947).

Petitioner, if given an opportunity, can prove that the limitations imposed by the Supreme Court of Montana will result in vast losses, equivalent to a confiscation. "In the absence of contract obligation" a judicial branch of the state

violates the Fourteenth Amendment by compelling an operation at a loss.

Georgia Power Co. v. Decatur, 281 U. S. 505, 508, 74 L. Ed. 999, 1003, 50 S. Ct. 369 (May, 1930).

4. In ignoring the plain and accepted meaning of the word "lien."

Western Union Teleg. Co. v. Lenroot, 323 U. S. 490, 506, 89 L. Ed. 414, 425, 65 S. Ct. 335 (Jan., 1945).

5. In encroaching upon the legislative function in violation of the rules of statutory construction.

Section 10519, Revised Codes of Montana, 1935 (Section 93-401-15, Revised Codes of Montana, 1947).

Morrison v. Farmers' etc. State Bank, 70 Mont. 146, 155, 225 Pac. 123 (Mar., 1924).

6. In ignoring its own prior decisions, to-wit: *Valier-Montana Land & Water Company v. Ries, et al,* 109 Mont. 508, 97 Pac. (2d) 584 (Jan., 1940).

Douglass v. Pike County, 101 U. S. 677, 687, 25 L. Ed. 968, 971 (Mar., 1880).

7. In imposing restrictions on the alienation of property in violation of the laws of real property and all modern concepts of public policy.

De Peyster v. Mitchell, 6 N. Y. 467 (1852).

8. In delegating legislative authority to an administrative board, i.e., The Carey Land Act Board of the State of Montana. (R. 118-119, 134.)

Panama Refining Co. v. Ryan, 293 U. S. 388, 79 L. Ed. 446, 55 S. Ct. 241 (Jan., 1935).

9. In discriminating against petitioner by deciding that certain rules apply to petitioner which do not apply to others within the same category. (R. 133.)

Southern Ry. Co. v. Greene, 216 U. S. 400, 417, 54 L. Ed. 536, 30 S. Ct. 287 (Feb., 1910).

10. In appropriating private property to a public use without just compensation. While the state is not subject to the Fifth Amendment, a denial of the safeguards of the first eight Amendments is a denial of due process of law under the Fourteenth Amendment.

Twining v. New Jersey, 211 U. S. 78, 79, 53 L. Ed. 97, 106, 29 S. Ct. 14 (Nov., 1908).

If a state statute, fair and impartial on its face is administered "by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Yick Wo v. Hopkins, 118 U. S. 356, 373-374, 30 L. Ed. 220, 227, 6 S. Ct. 1064 (May, 1886).

STATE STATUTE ENLARGED AND SUPPLEMENTED SO AS TO IMPAIR OBLIGATIONS OF CONTRACT

The Supreme Court of the State of Montana has injected matters into the legislation of Congress and of the Montana Legislature entirely beyond the wording of the statutes. In doing so it has ignored all of the limitations on the judiciary.

Western Union Teleg. Co. v. Lenroot, 323 U. S. 490, 506, 89 L. Ed. 414, 425, 65 S. Ct. 335 (Jan., 1945).

Commissioner of Int. Rev. v. Beck's Estate et al, 129 F. (2d) 243 (2nd C. C. A., June, 1942).

In effect, the Montana Court has encroached upon the function of the legislative branch of government, and has impaired the sanctity of petitioner's contracts with the State of Montana bringing about a construction never before contemplated by the parties nor the legislative bodies.

Douglass v. Pike County, 101 U. S. 677, 687, 25 L. Ed. 968, 971 (Mar., 1880).

CONCLUSION

For the reasons stated, your petitioner respectfully prays that a Writ of Certiorari issue to enable this Court to review the judgment of the Supreme Court of the State of Montana.

Respectfully submitted,

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APPENDIX "A"
TO PETITION FOR WRIT OF CERTIORARI

TITLE 43, U. S. C. A.

CHAPTER 14.—GRANTS OF DESERT LANDS TO STATES FOR RECLAMATION (THE CAREY ACT).

"Section 641. Grant of desert land to States authorized. To aid the public-land States in the reclamation of the desert lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President is, as of August 18, 1894, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined in section 322 of Chapter 9 of this title, to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed or* occupied, and not less than twenty acres of each one hundred and sixty acre tract cultivated by actual settlers, as thoroughly as is required of citizens who may enter under the said** desert-land law, chapter 9 of this title, within ten years from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if actual construction of reclamation works is not begun within three years after the segregation of the lands or within such further period not exceeding three years, as shall be allowed by the Secretary of the Interior, the said Secretary of the Interior, in his discretion, may restore such lands to the public domain; and if the State

fails, within ten years from the date of such segregation, to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period not exceeding five years, or may, in his discretion, restore such lands not irrigated and reclaimed to the public domain upon the expiration of the ten-year period or of any extension thereof.

"Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved.

"Any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any

way whatever, except to secure their reclamation, cultivation and settlement.

"As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. (Aug. 18, 1894, c. 301, §4, 28 Stat. 422; *** Jan. 6, 1921, c. 10, 41 Stat. 1085.)

"* 'or' where indicated should be omitted as in the original text.

** 'said' should be omitted.

*** 'Mar. 3, 1901, c. 853, §3, 31 Stat. 1188;' should be inserted."

"§642. *Liens for expenses of reclamation.* Under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in the preceding section, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation until dis-

posed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part. (June 11, 1896, c. 420, §1, 29 Stat. 413.*)

"* '413' should read '434' "

APPENDIX "B"
TO PETITION FOR WRIT OF CERTIORARI

Section 1976, Revised Codes of Montana, 1935 (Section 81-2111, Revised Codes of Montana, 1947).

"Any person or company entering into a contract to construct canals or other irrigation works, and to sell water rights to settlers under this act, may maintain and operate the same until perpetual water rights appurtenant to ninety per cent. of the lands, to reclaim which such works were constructed, have been sold and paid for, when such works shall be turned over to the settlers and others owning rights to take water from such canals, who shall have the right thereafter to maintain and operate it. The contractor, so long as he maintains and operates the irrigation works, shall have the right to collect from settlers on such lands not to exceed one dollar per acre, per year, for each acre of land to which his or her water right is appurtenant, said charge to include the cost of maintenance, operation, and delivery of water to said land."

Section 1980, Revised Codes of Montana, 1935 (Section 81-2115, Revised Codes of Montana, 1947).

"*Applications to settle lands reclaimed.* Any citizen of the United States, or any person having declared his intention to become a citizen of the United States, over the age of twenty-one years, may make application, under oath, to the board, to enter any of said land at any time after the same has been classified, in any amount not to exceed one hundred and sixty acres for any one person; and such appli-

cation shall set forth that the person desiring to make such entry does so for the purpose of settlement in accordance with the act of Congress and the laws of this state relating thereto, and that the applicant has never received the benefit of the provisions of this act to an amount greater than one hundred and sixty acres, including the number of acres specified in the application under consideration. Such application must be accompanied by a certified copy of a contract for a perpetual water right, made and entered into by the party making application with the person, company, or association who has been authorized by the board to furnish water for the reclamation of said lands; and if said applicant has at any previous time entered land under the provisions of this act, he shall so state in his application, together with description, date of entry, and location of said land. The board shall thereupon file in its office the application and papers relating thereto, and, if allowed, issue a certificate of location to the applicant. All applications of entry shall be accompanied by a payment of twenty-five cents per acre, which shall be paid as partial payment on the land if the application is allowed; and all certificates when issued shall be recorded in a book to be kept for that purpose. If the application is not allowed, the twenty-five cents per acre accompanying it shall be returned to applicant; provided, that where the construction company fails to furnish water to any settler under the provisions of its contract with the state, the state shall refund to such settler all payments that he shall have made to the state."

Section 1983, Revised Codes of Montana, 1935 (Section 81-2118, Revised Codes of Montana, 1947).

"Water rights—foreclosure of lien for deferred payments. (1) The water rights to all lands acquired under the provisions of this act shall attach to and become appurtenant to the land as soon as title passes from the United States to the state. Any person, company, or association furnishing water for any tract of land shall have a first and prior lien on said water right and land upon which said water is used for all deferred payments for said water rights; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner or possessor of said lands. Upon default in any of the deferred payments secured by any lien under the provisions of this act, the person, company of persons, association, or incorporated company holding or owning said lien may foreclose the same in the same manner as mortgages of real property are foreclosed. All sales shall be advertised in a newspaper of general circulation, published in the county where said land or some part thereof is situate, for six consecutive weeks, and the same shall be sold to the highest bidder at the front door of the court-house of the county, or such place as may be agreed upon by the terms of the aforesaid contract. The sheriff of said county shall in all such cases give all notices of sale, and shall sell all such land and water rights, and shall make and execute a certificate of sale to the purchaser thereof, and at such sale no person, company of persons, association, or incorporated company owning and holding any lien shall bid in or purchase any land or water right at a greater price than the amount due on deferred payment for said water right and land, and the cost incurred in making the sale of said land and water right. At any time within twelve months

after the foreclosure sale by the sheriff of the land and water right as aforesaid, the original owner against whom the lien has been foreclosed may apply to the person, company of persons, association, or incorporated company purchasing at such sale, to redeem said land and water rights, and the purchaser shall assign the certificate of sale to such land and water rights to such original owner upon the payment by him within such twelve months of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest at ten per cent. per annum, costs, and charges thereon.

"(2) When the lien holder becomes the purchaser at such foreclosure sale, and such lands and water rights are not redeemed by the original owner within twelve months, then at any time within three months thereafter any person desiring to settle and use such lands and water rights may apply to the purchaser at such foreclosure sale to redeem such land and water rights, and such purchaser shall assign the certificate of sale of such land and water rights to the person desiring to redeem the same, upon the payment by him of the amount of the lien for which the same was sold at such foreclosure sale, together with the interest, costs, and charges thereon.

"(3) Upon issuing any certificate of sale, it shall be the duty of the sheriff to file for record in the office of the county clerk of the county where such land is situated, a certified copy of such certificate of sale assigned to him by the purchaser as aforesaid, upon his redemption of such land and water rights. In case the land and water rights shall be redeemed by any person other than the original

owner, the sheriff shall, upon presentation of such certificate, issue a deed for such land and water rights to the person redeeming the same. If the land and water rights shall not be redeemed by any person within the time and in the manner hereinbefore provided, it shall be the duty of the sheriff, upon presentation of certificate of sale by the original purchaser to issue a deed to such purchaser.

"(4) Where such land and water rights are not purchased by the lien holder at such foreclosure sale, it shall be the duty of the sheriff to first pay the lien holder out of the proceeds of such sale the amount of the lien, together with all interest, costs, and charges thereon, and to pay any balance remaining to the person against whom such lien has been foreclosed, and for his services in such cases the sheriff shall receive the same fees as are provided by law in civil cases. Under no circumstances shall a lien be foreclosed against land belonging to the state and not filed on by an individual. In case the claimant whose rights to any such land and water shall have been divested by any deed issued, as in this section provided, shall not have paid to the state sums due or to become due to it on account of such land, any person desiring to settle upon the same shall acquire the right so to do upon payment to the grantee under such sheriff's deed of the amount which would have effected a redemption at the time, with ten per cent. additional; provided, that the holder under the deed shall have the right to remove any crops which may be growing upon such land at the time such intending settler offers to pay such sum."

Supreme Court of the United States

October Term, 1950

No._____

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Petitioner,

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THE STATE OF MONTANA, CAREY LAND ACT BOARD, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General; and PONDERA COUNTY CANAL AND RESERVOIR COMPANY, a Montana Corporation,

Respondents.

JOINDER BY RESPONDENT, THE STATE OF MONTANA, CAREY LAND ACT BOARD, COMPRISED OF SAM C. FORD, GOVERNOR; SAM W. MITCHELL, SECRETARY OF STATE; R. V. BOTTOMLY, ATTORNEY GENERAL, IN PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The State of Montana, Carey Land Act Board, comprised of Sam C. Ford, Governor; Sam W. Mitchell, Secretary of State; R. V. Bottomly, Attorney General, one of the respond-

ents upon this petition for Writ of Certiorari, by its counsel, hereby joins in petitioner's prayer that a writ of certiorari issue to review the decision of the Supreme Court of the State of Montana which was made final by the Order Denying Petition for Rehearing, entered in the above entitled cause March 29, 1950.

NATURE OF THE CASE

The nature of the case is described in petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Montana and in the opinion of the majority of the Supreme Court of the State of Montana.

Respondent submits that the public interest suggests further review of the case by this Court.

SCOPE OF REVIEW SOUGHT

Respondent is desirous that, upon issuance of the Writ, the Court examine and review all of the issues in the case without limitation of the number or form of the issues specified by petitioner. Such plenary review is necessary in order that questions relating to the title to said Federal "Carey Act" lands be put at rest.

WHEREFORE, respondent joins in petitioner's prayer that a Writ of Certiorari issue as above set forth.

Dated this 10th day of July, 1950.

H. B. LANDOE,

Counsel for Respondent, State of Montana, Carey Land Act Board, et al.

Bozeman, Montana